No. 82-6019

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

CL w/ 82-1095

ROBERT ALTON HARRIS,

Cross-Petitioner,

v.

R. PULLEY, Warden of the
California State Prison at
San Quentin,

Cross-Respondent,

CROSS-PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

QUIN DENVIR
State Public Defender
EZRA HENDON
Deputy State Public Defender
MICHAEL MILLMAN
Deputy State Public Defender
ERIC MULTHAUP
Deputy State Public Defender
CHARLES M. SEVILLA
Chief Deputy State
Public Defender

110 West C Street
Suite 2102
San Diego, CA 92101
Phone: [619]237-6552

Attorneys for Cross-Petitioner
ROBERT ALTON HARRIS

MICHAEL J. McCABE
Savitz & McCabe
108 Ivy Street
San Diego, CA 92101
Phone: [619]231-1181

QUESTION PRESENTED FOR REVIEW [1]

Whether California's death-penalty statute, as applied to sentence petitioner to death, violates the Eighth or Fourteenth Amendment to the Constitution of the United States?

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1. Pursuant to Rule 20.5, petitioner seeks the grant of the instant cross-petition only in the event the Court should grant the petition for a writ of certiorari filed on December 28, 1982 by Warden Pulley.

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TO THE HONORABLE CHIEF JUSTICE AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The cross-petitioner, ROBERT ALTON HARRIS, respectfully requests, in the event this Court grants the petition for a writ of certiorari filed on December 28, 1982 by Warden Pulley that this cross-petition be granted to review the September 16, 1982 decision of the Court of Appeal (Appendix A).[2/] Petitions for rehearing in the court below were denied on November 15, 1982, and minor modifications were made in the majority opinion (Appendix B).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. section 1254(1) and Rules 19.5 and 20.5 of the Rules of this Court.

2. Cross-petitioner's references to the opinion of the Court of Appeal (as Appendix A) and the modification of the opinion (Appendix B) are to the Appendices already filed by Warden Pulley.

CONSTITUTIONAL PROVISIONS

The Eighth Amendment provides in part:

> ". . .nor [shall] cruel and unusual punishments [be] inflicted."

The Fourteenth Amendment provides in part:

> "No State shall. . .deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

PROCEEDINGS BELOW

Cross-petitioner, ROBERT ALTON HARRIS, after the affirmance of his judgment of death by the California Supreme Court (People v. Harris (1981) 28 Cal.3d 935), filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of California. The district court dismissed cross-petitioner's claims without reviewing the state court record or holding an evidentiary hearing. The Ninth Circuit vacated the dismissal order and remanded the matter for reconsideration of cross-petitioner's claims of prejudicial pre-trial publicity (Appendix A, 37-8), discriminatory infliction of the death penalty based on race of the victim and sex of the offender (id. at 29-32), and to permit the California Supreme Court "to determine if the death penalty in this case is proportionate to other sentences imposed for similar crimes" (id. at 22).

ARGUMENT

CROSS-PETITIONER HARRIS' SENTENCE OF DEATH IS INDISTINGUISHABLE FROM WILLIAM HENRY FURMAN'S (FURMAN v. GEORGIA (1972) 408 U.S. 238) BECAUSE THE CALIFORNIA DEATH PENALTY STATUTE UNDER WHICH HIS JURY WAS INSTRUCTED PERMITS UNFETTERED, UNREVIEWABLE JURY DISCRETION IN SELECTING WHICH DEFENDANTS MUST DIE, AND AS SUCH IS UNCONSTITUTIONAL FOR FAILING TO GUIDE JURY DISCRETION TO PRODUCE RATIONAL AND CONSISTENT DEATH SENTENCES.

A majority of the Court of Appeals rejected cross-petitioner Harris' contentions that the California death-penalty statute, as applied to sentence him to death, violated the Eighth and Fourteenth Amendments. The California statute, "examined on an individual basis" as required by Gregg v. Georgia (1976) 428 U.S. 153, 195, exhibits numerous constitutional deficiencies which were raised by cross-petitioner in the proceedings below and have been catalogued in Judge Canby's concurring opinion (App.A, 61-66) and in the separate dissenting opinions of Chief Justice Bird and Justice Mosk in People v. Jackson (1981) 28 Cal.3d 339-365 (Bird, C.J.), 336-339 (Mosk, J.).[3/] These deficiencies include the lack of clear and objective standards which the state "deems particularly relevant to the sentencing decision" (Gregg v. Georgia, supra, at 192); the lack of restrictions on the sentencing authority's use of non-statutory aggravating factors in making a sentencing decision (People v. Murtishaw (1980) 29 Cal.3d 733, 773); the lack of any burden or standard of proof to govern the fact-finding or penalty decision by the sentencing authority (Cf. Santosky v. Kramer (1982) ____ U.S. ____, 71 L.Ed.2d 599; Bullington v. Missouri (1981) 451 U.S. 430); and the absence of written findings of those factors relied upon by the sentencing authority in imposing a death sentence (see Judge Canby's concurring opinion, supra, finding the California statute unconstitutional for this reason alone).

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3. Justice Tobriner joined the dissents of both the Chief Justice and Justice Mosk.

The Court of Appeals majority's rejection of cross-petitioner's challenge to the California statute on the grounds set forth above would not ordinarily warrant review by certiorari at this time, because it is dictum. Nor do the issues raised by the Warden's petition for certiorari warrant review by this Court, inasmuch as the decision below does nothing more than require the California Supreme Court to give cross-petitioner Harris the kind of appellate review of his death sentence which the California Supreme Court said in People v. Frierson (1979) 125 Cal.3d 142, 180-184 that it would give to all California death sentences, but which it did not provide in cross-petitioner's case. Such a remand to the California Supreme Court to "remove any legitimate basis for finding ambiguity" concerning the scope and nature of appellate review afforded by the California Supreme Court is manifestly appropriate, Eddings v. Oklahoma (1982) ___ U.S. ___, 71 L.Ed.2d 1, 14 (O'Connor, J., concurring). Until the California Supreme Court has reconsidered the matter so as to resolve this ambiguity, the case presents no significant issue of federal constitutional law requiring decision. 4/

However, should the State's petition for certiorari be granted, it would be manifestly appropriate for the Court to grant this cross-petition in order to consider Harris' challenges to the California statute as well. This is so, first, because the question of the scope of constitutionally required appellate review of death sentences under the California statutory scheme cannot properly be considered in isolation from other

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4. Before this Court considers the issue of whether California's death statute requires some form of case-comparison review, it should first have the benefit of the California Supreme Court's views on the question. The issue is currently before that Court in In re Jackson, Crim. No. 22165. (See concurring opinion of Justice Kaus in People v. Easley (12/10/82) ___ Cal.3d ___, p.8, noting that the issue of proportionality review is "unsettled" in that Court and is pending in Jackson.)

features of California's death-sentencing procedure which constitute the gravamen of cross-petitioner Harris' challenges to it; and, second, because if the decision of the Court of Appeals below is to be reopened, the majority's rejection of cross-petitioner's challenges to the California statute lose their character as dictum and may become decisive of cross-petitioner's life or death. If so, they should be authoritatively reviewed by this Court.

CONCLUSION

WHEREFORE, if the State's petition for certiorari is granted, cross-petitioner Harris prays that this cross-petition also be granted.

DATED: Jan. 6, 1983

Respectfully submitted,

Charles M. Sevilla

QUIN DENVIR
State Public Defender
EZRA HENDON
Deputy State Public Defender
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Deputy State Public Defender
ERIC MULTHAUP
Deputy State Public Defender
CHARLES M. SEVILLA
Chief Deputy State
Public Defender

Attorneys for Cross-Petititioner
ROBERT ALTON HARRIS

Michael J. McCabe

MICHAEL J. McCABE
Savitz & McCabe
108 Ivy Street
San Diego, CA 92101

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CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO PROCEED ON CROSS-PETITION FOR WRIT OF CERTIORARI IN FORMA PAUPERIS

QUIN DENVIR
State Public Defender
EZRA HENDON
Deputy State Public Defender
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Public Defender

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Suite 2102
San Diego, CA 92101
Phone: [619]237-6552

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MOTION FOR LEAVE TO PROCEED ON CROSS-PETITION FOR WRIT OF CERTIORARI IN FORMA PAUPERIS

Pursuant to 18 U.S.C. section 3006A(d)(6) and Rule 46 of this Court, the cross-petitioner, Robert Alton Harris, asks leave to file the attached cross-petition for Writ of Certiorari to the Supreme Court of the United States, without prepayment of fees or costs and to proceed in forma pauperis.

Cross-petitioner has been indigent at all times during the proceedings against him. In both the state courts as well as in the federal courts below he has had counsel appointed to represent him, and if his cross-petition for writ of certiorari is granted, he respectfully requests that the Court appoint counsel to represent him.

DATED: Jan. 6, 1983

Respectfully submitted,

QUIN DENVIR
State Public Defender
EZRA HENDON
Deputy State Public Defender
MICHAEL MILLMAN
Deputy State Public Defender
ERIC MULTHAUP
Deputy State Public Defender
CHARLES M. SEVILLA
Chief Deputy State
Public Defender

by Charles M. Sevilla
CHARLES M. SEVILLA

110 West C Street, Suite 2102
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